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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

Respondent most earnestly insists that there is no such question presented in this petition for certiorari as insisted upon by petitioner under the subject captioned "Questions Presented". In other words, the construction of Section 7051 and Section 7052 of the Compiled General Laws of Florida for 1927 is not involved herein. The only question that could be in-

volved in this record is whether or not the District Court and the Circuit Court of Appeals committed error in holding as a matter of law under the evidence in this case that the negligence of the petitioner's husband was the sole proximate cause of the accident, resulting in the death, and this question is not raised in the petition. It is erroneously assumed in the petition that the Circuit Court of Appeals determined the question of liability or non-liability upon the ground that under the evidence in this case the respondent was guilty of negligence proximately contributing to the accident that concurred with that of petitioner's husband. The Circuit Court of Appeals did not so hold.

While this Court is not interested in the discussion of academic questions, suffice to say that we agree with the propositions of law contended for by petitioner to the effect that where both the driver of an automobile and a railroad company are guilty of concurring negligence proximately contributing to an accident there may be a recovery under the Florida Comparative Negligence Statute, but that the damages should be diminished in proportion to the negligence of the driver of the automobile.

Statutes Involved.

Under the caption "Statutes Involved" petitioner sets forth in *hæc verba* Section 7051 and Section 7052 of the Compiled General Laws for 1927, but our statement in answer to petitioner's "Questions Presented" sets forth our contention with respect thereto, to-wit: the statute is not involved herein.

Statement.

It is correctly stated by petitioner that she in her own right, as widow, and as administratrix, brought five separate actions in the District Court of the United States, for the Southern District of Florida, against the respondent for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing, and at the conclusion of all of the evidence the District Court directed verdicts for the railroad company; that there were five separate verdicts and five separate judgments; separate appeals were taken to the Circuit Court of Appeals on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case, and disposed of by a single written opinion. It is true that in the *opinion* the action of the District Court was affirmed insofar as the matter herein sought to be reversed was concerned and reversed as to the four cases growing out of the death of the minor children. However, only one *judgment* was entered in the said Circuit Court of Appeals, covering all five cases, dealing therewith as one cause, in which judgment it is recited "that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court" (R. 104).

It would seem that five separate judgments should have been entered in the Circuit Court of Appeals, and inasmuch as an appeal or certiorari should be sought from a judgment and not from an opinion, that peti-

tioner herein is seeking redress from a judgment in her favor rather than an affirmance as complained of in the petition. However, we take it that petitioner's rights, if any, should not be prejudiced by failure of the Circuit Court of Appeals to enter the proper judgment based upon its opinion, and that this Court will treat the judgment of reversal and remand of this cause "for such further proceedings not inconsistent with the opinion" as in effect a judgment of affirmance of the action of the lower court in directing the verdict. We are simply calling the court's attention to this state of the record before discussing the merits.

If we are correct in our reply to petitioner's discussion of "Questions Involved", a reply to petitioner's discussion of the Statement of the Case is unnecessary and that the petition for certiorari should be denied because the certiorari is not sought upon the ground that both the District Court and the Circuit Court of Appeals were in error in their finding that as a matter of law the sole proximate cause of the accident, the subject of this controversy, was the negligence of the driver of the vehicle, petitioner's husband.

However, we deem it proper to call this Court's attention to certain misstatements of fact contained in the petition which are not borne out by the record and to actual facts upon which the District Court and a jury were called upon to pass.

Under the subject title "Statement", it is said:

> "A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (Record 134, 135), which we quote, but to which we have added in brackets the record page reference of the facts thus recited."

We can quite understand why the petitioner is satisfied with the statement of facts set forth in the opinion, but with the greatest deference and respect for the Circuit Court of Appeals, we unhesitatingly say that the statement of facts contained in said opinion and to which reference is made is absolutely in the most material matters in conflict with the actual facts contained therein.

We will briefly call the court's attention to some of these misstatements of fact. It is said:

> "The fireman (R. 93) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine."

The fireman did not so testify, nor could any such inference be drawn from anything he did testify. On the contrary, he testified:

> "I was sitting on my side and I got down about 30 or 40 feet from the crossing and saw this car coming up about the same distance from the crossing, and went right in front of the engine, and I jumped up and hollered to him to put on the emergency."
>
> "I hollered to the engineer, warning him of the danger when the engine was about thirty to sixty feet from the crossing."

Again, on cross-examination, the witness testified:

> "I told the engineer when we were about thirty to sixty feet before we got to the crossing. * * * When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop" (R. 93).

In other words, this witness testified that when he, the fireman, was between thirty and sixty feet from the point where the accident happened, he saw this automobile coming, and it was about the same distance, to-wit, thirty to sixty feet from the point of the accident. No witness testified that the automobile was on the crossing sixty feet in front of the engine.

Again, it is said:

> "But the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

There is not a line of evidence that he stopped.

The plaintiff introduced one person, who claimed to be an eye-witness, a Mrs. Crystal Towne, who said that she was about one hundred and fifty feet from the railroad track, and said that she saw the train strike the car (R. 86). This witness did not state, even by any inference, that the automobile stopped, or that she saw it, other than at the very moment of the collision.

The other eye-witnesses were: Mrs. Mabel Seeley, who testified that he did not stop, but that he slackened his speed a little, and he then speeded up across the tracks (R. 97-98).

E. H. Baldwin testified, on direct examination, that he drove right in front of the train, and that as well as he can tell he did not slow up, or stop, from the time he first saw him. On cross-examination, he testified:

> "I know he slackened the speed of his car some but not very much" (R. 106).

Ray Outman, a negro, and an eye-witness, testified that he saw the automobile before it got to the track, and that it did not stop or slacken its speed before it went upon the track (R. 107).

The fireman, A. R. White, testified that from the time he first saw the automobile until the time of the crash, it did not slow up, or stop, or change its speed any (R. 93).

Therefore, it cannot be said to be uncertain as to whether or not he stopped. The evidence is uncontradicted that he did not stop.

There are certain exhibits in the record showing the situation that existed at the time of the accident which will aid the court materially, and it must be remembered that the trial court had the same opportunity as jurors have for seeing the witnesses, for noting all those matters not capable of record, and it was his deliberate opinion that there was no excuse for a verdict, save in favor of the defendant, and so instructed the jury (*Patton* v. *Texas Pac. R. R.*, 179 U. S. 658).

We take it that it is not necessary to discuss further the actual facts of the case as presented to the jury, because even upon the facts set forth in the opinion of the Circuit Court of Appeals, which alleged facts we most respectfully and deferentially submit bear most harshly and unjustly upon the defendant, the Circuit Court of Appeals found, as did the District Court, that the accident was brought about solely through the negligence of the driver of the vehicle, and having so found the action of the District Court was therefore affirmed.

Rulings of the Court.

Under the subject index, entitled "Rulings of the Court Below", it is correctly stated that the District Court directed a verdict for the respondent upon the ground that the injuries complained of were caused solely by the negligence of petitioner's husband, and we respectfully submit that the Court of Appeals, in affirming its judgment, based its affirmance upon the same ground, to-wit, that the negligence of the driver of the vehicle was the sole proximate cause of the accident.

It must be borne in mind that the Circuit Court of Appeals in its opinion, and by this we mean the majority opinion, had before it five separate alleged causes of action, and in its opinion rendered judgment in said five separate causes of action, but in doing so that said Circuit Court of Appeals first discussed the case, the subject of this petition, and thereafter discussed the four cases which involved the death of petitioner's children, and we respectfully challenge lawyer or layman to read that part of the opinion dealing with the case involved in this petition, to-wit, the alleged cause of action of the petitioner for the death of her husband, and come to any other conclusion than that the Circuit Court of Appeals was of the same opinion as the District Court, to-wit, that the sole proximate cause of the accident, resulting in the death of petitioner's husband, was the negligence of petitioner's husband. The opinion of the majority of the Circuit Court of Appeals, after setting forth the facts generally surrounding the happening of the accident, and

then certain specific statements of fact not borne out by the record, as hereinabove pointed out, said:

> "Her husband as driver of the automobile was under the duty of exercising the care and caution which a reasonably prudent man would have displayed under the same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track, he had looked, he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Section 7052, he could not have recovered for an injury, and so recovery cannot be had on account of his death."

This holding was undoubtedly based upon the decision of this Court in the case of *B. & O. R. R. Co.* v. *Goodman,* 275 U. S. 66, 72 Law Ed. 167; in other words, under the assumed state of facts, the Circuit Court of Appeals held that the negligence of the driver of the vehicle was the sole proximate cause of the accident. As a matter of fact the record disclosed that the automobile was not driven upon the track 60 feet in front of the engine, that the driver of the automobile did not stop before entering upon the track, but, on the contrary, slackened his speed, looked in the direction from which the train was approaching, and speeded up across the track. These were the facts presented to the jury and the trial court upon which a verdict was

directed in favor of the defendant, and we say, Can it be doubted, that if these facts are true, that as a matter of law the sole proximate cause of the accident was the negligence of the driver?

It is true that in discussing the case of the driver, the only case involved in this petition, it was not stated in the majority of the opinion of the Circuit Court of Appeals that the negligence of the driver was the sole proximate cause of the accident, yet, on the contrary, it was not stated that any negligence of the defendant proximately contributed to produce the accident, and the Circuit Court of Appeals, after arriving at the conclusion that plaintiff could not recover for the death of her husband, cited as authority for the proposition thus laid down those decisions of the Supreme Court of Florida, in every one of which the determinative factor was that the accident in question was brought about by the negligence of the plaintiff which was the sole proximate cause, and in none of which was the question of contributory negligence involved. Those cases are as follows:

Seaboard Air Line R. R. Co. v. *Tomberlin,* 70 Fla. 435, 70 Sou. 437, Syllabus 3:

> "In a suit against a railroad company for damages for personal injuries sustained in attempting to cross a railroad track at a street crossing, where the evidence affirmatively shows that the plaintiff failed to exercise that degree of prudence which the known risks required, but negligently rode a motorcycle upon the railroad track in front of an approaching train, the speed of the train cannot be considered the proximate cause of the injury."

In the case of *Egley* v. *Seaboard Air Line R. R. Co.*, 84 Fla. 147, 93 Sou. 170, the syllabus is:

> "One who approaches a railroad crossing in an automobile at a point where an approaching train may be seen at a great distance and fails to wait for the passing of the train which may be seen approaching before undertaking to cross, but drives his automobile slowly upon the track in front of the approaching train, cannot be said to have exercised reasonable precaution for his own safety, and not to have been the sole cause of his own injury, if he sustains any by the train."

In the case of *Atlantic Coast Line R. R. Co.* v. *Gornto*, 89 Fla. 97, 103 Sou. 117, a case very much like the case at bar, held that one who failed to exercise the degree of prudence which the known risks required and negligently attempted to pass over a crossing in front of a rapidly approaching train, there could be no recovery by him, and then used this language:

> "The accident occurred in the daytime. It was a prominent and frequently used crossing. The plaintiff, who was driving the car, was familiar with the crossing. He was, so far as the evidence discloses, in possession of his normal senses. Upon the question of whether the whistle was blown or the bell rung, or other signal given by the train on its approach, there is conflict in the evidence. But from the evidence including photographs of the crossing and its environs, contained in the record, it appears that for some distance before reaching the crossing the view from the highway in the direction from which the train was coming was un-

> obstructed, so that its approach was obvious to one exercising his normal faculties of sight and hearing."

In the case of *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842, the court held that the negligence of the plaintiff was the sole proximate cause of the injury, and used this language:

> "Had there been negligence of the defendant railroad company in operating its train as alleged, which appreciably contributed to causing the injury, the defendant would be liable for damages under the statute, even though negligence of the plaintiffs also proximately contributed to the injury; the recoverable damages being diminished in proportion to the default attributable to the plaintiffs."

In the case of *Covington* v. *Seaboard Air Line R. R. Co.*, 99 Fla. 1102, 128 Sou. 426, which was an action, by a minor riding with his father, against the railroad company for injuries sustained at a crossing collision, in the opinion of the majority of the court, it was said:

> "By the exercise of reasonable prudence Mr. Covington could have seen the approaching train in time to have stopped his automobile which was under control. His failure to use such precaution would preclude the plaintiff from recovering for the injury sustained."

Mr. Justice Brown, evidently thinking that the opinion of the majority of the court might be susceptible of the construction that the negligence of the father was imputed to the minor children, used this language:

> "I do not think that the negligence of the father, the driver of the car, was imputable to the young son, who, by next friend, was the plaintiff below. But the real question was whether the injury to the plaintiff was caused by the concurring negligence of the defendant and the plaintiff's father, or was the negligence of the father the sole proximate cause of such injury. *Seaboard Air Line R. Co.* v. *Watson,* 94 Fla. 571, 113 Sou. 715. The evidence so strongly preponderated to sustain the plea that the collision and injury was due solely to the negligence of the father that this court would not be authorized to hold the lower court in error in granting the motion for new trial."

In the case of *Southern Ry. Co.* v. *Mann,* 91 Fla. 948, 108 Sou. 889, after reviewing the evidence, used this language:

> "By the well-established rule of this court, the record not only exhibits the degree of flagrant carelessness on the part of the plaintiff as would bar recovery, but we think it meets and rebuts the presumption of negligence cast on it by the law, and shows that the agents of the defendant exercised all ordinary and reasonable care and diligence in approaching the crossing."

These are the cases cited by the court to sustain its opinion in affirming the action of the District Court. And that the Circuit Court of Appeals thus construed the evidence as establishing the fact that the negligence of the driver was the sole proximate cause of the accident cannot be doubted when it is seen that in the case cited by it of *Florida East Coast Ry. Co.* v.

Davis, supra, the Supreme Court of Florida, in discussing the Comparative Negligence Statute, said in language which cannot be misunderstood that where there has been negligence of the defendant appreciably contributing to causing injury, the defendant would be liable, even though the negligence of the plaintiff also contributed to the proximate cause of the injury. Yet, in that very case, with that construction before it, the Supreme Court of Florida held that the negligence of the plaintiff was the sole proximate cause; and, in citing this case as authority for the position they took, the Circuit Court of Appeals undoubtedly had in mind the rule of law thus laid down in that case.

The astonishing feature of the opinion of the Circuit Court of Appeals is that part of its opinion dealing with alleged causes of action not involved in this petition, wherein the Circuit Court of Appeals reversed the District Court for those alleged causes of action growing out of the death of the minor children, on the theory that the jury might reasonably have concluded that the deaths of the children were caused by the combined or concurrent negligence of their father and the Railroad Company. Suffice to say, respondent in this cause has, as petitioner in those cases, filed its petition for certiorari, the application for which is now pending in this Court, it being the theory of petitioner in those causes that if the negligence of the driver of the vehicle was the sole proximate cause of the accident, that every result flowing from that accident was attributable to the same proximate cause.

The most plausible solution of the incongruous position taken by the Circuit Court of Appeals is that they

held that the driver of the car had the last clear chance to avoid the accident resulting in his death, and, therefore, his act became the proximate cause of the accident and any negligence of the railroad became a remote cause, but that the negligence of the driver, not being imputable to the children therefore the concurring proximate negligence of the driver with that of the remote negligence of the railroad company transformed the railroad's remote negligence into a proximate cause. This is not the law.

A clear statement of the law will be found in *R. C. L.*, vol. 20, par. 89, pg. 104, wherein it is said:

> "Again, unless the ultimate injury is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring or succeeding negligence of a stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that it is not actionable into a cause so proximate that an action can be maintained upon it. It cannot create a liabiliay against one who does not legally cause it, or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence."

After all, the so-called "last clear chance" doctrine is a method of determining the proximate cause, and whether it is called "last clear chance", "intervening cause" or "efficient cause" is immaterial. (*Milwaukee*

& St. Paul Ry. Co. v. *Kellogg,* 94 U. S. 469, 24 Law Ed. 256; *Ætna Fire Insurance Co.* v. *Boone,* 95 U. S. 117, 24 Law Ed. 395.

Circuit Judge Sanborn, in the case of *Cole* v. *German Savings and Loan Association,* 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A., page 416, discussed very learnedly the question of proximate cause and intervening causes, and made this pertinent observation:

> "It is now no longer difficult to determine whether or not the acts of the defendant were the proximate cause of the injury to the plaintiff. Wharton says: 'Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter (as to which I am not contractually bound). Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.' "

So that we insist that if the Circuit Court of Appeals were predicating their action in reversing the causes, involving the death of the minor children, on the

theory that because the children were guilty of no negligence that the negligence of the railroad company, which was as to the driver a remote cause, was thereby transformed into a proximate cause, it is illogical and unsound and not supported by any authority.

The Dissenting Opinion of Circuit Judge Hutcheson.

The theory of petitioner is that the Circuit Court of Appeals held that although the defendant was guilty of negligence which appreciably contributed to the happening of the accident and causing the injury, yet there can be no liability by reason of his contributory negligence, and the only basis for such contention can be found in the dissenting opinion of Circuit Judge Hutcheson. Certainly the majority of the Circuit Court of Appeals would not have cited, as sustaining the proposition advanced, the case of *Florida East Coast Ry. Co. v. Davis, supra,* which held exactly contrary to this contention.

An examination of the dissenting opinion of Circuit Judge Hutcheson, in which he construed the majority to hold that the negligence of the respondent was a concurring proximate cause with the negligence of the driver, demonstrates clearly that the majority opinion does not so hold, but, on the contrary, bases its action upon the ground that the negligence of the driver was the sole proximate cause of the accident. To contend otherwise, is to charge the majority of the court with having cited authorities to sustain a proposition which are not only inapplicable, but hold exactly contrary to the proposition advanced. For instance, it is said in

this dissenting opinion that every decision cited by the majority is based on the case of *Atlantic Coast Line R. R. Co.* v. *Miller*, 44 Sou. 249 (should be "247—see 249"). He is undoubtedly correct in this assumption, and following that case is cited that of *Florida East Coast Ry. Co.* v. *Davis*, 96 Fla. 171, 117 Sou. 842, in which the Supreme Court of the State of Florida declares the correct construction of the Florida Comparative Negligence Statute, but said that in that particular case it was not applicable because the negligence of the driver was the sole proximate cause. The opinion of Circuit Judge Hutcheson as to the law in Florida and the decisions of the Supreme Court referred to by him are absolutely sound and the established law of the State of Florida, but his opinion, taken in connection with the authorities cited, conclusively demonstrates that the majority opinion does not

> "advance a third view as maintainable in Florida, that there are degrees of contributory negligence * * *."

We cannot conceive of the Circuit Court of Appeals as having advanced a proposition of law and in support thereof having cited authorities holding exactly contrary thereto.

Conclusion.

There can be no great importance attached to the question presented in this petition for certiorari. There is no rule of law or construction of the Florida Comparative Negligence Statutes involved, because there is no dispute as to its proper construction. We quite agree with every authority cited by petitioner in

her brief in support of the petition, but say that she is discussing an academic question not involved herein, and that the sole question which could possibly be raised on this record is whether or not the District Court was correct in determining as a matter of law that the sole proximate cause of the accident was the negligence of the driver of the vehicle—plaintiff's husband; and the Circuit Court of Appeals, having affirmed the action of the District Court in this respect, this Court should not be asked to review this cause on her petition for certiorari.

Respectfully submitted,

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